ᓄᓇᕗᑦ ᐃᓅᓯᖅᑐᐃᓕᓴᕐᓂᖅ
nunavuumi iqkaqtuijikkut
NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***CBC v. Her Majesty The Queen*, 2013 NUCJ 06**
Date of Judgment:	20130515
File Number:	08-13-259
Registry:	Iqaluit
Respondent: (The Crown)	**Her Majesty The Queen**
	-and-
Accused:	**Mark Caine**
Applicants:	**Patricia Bell, Emily Ridlington, and the Canadian Broadcasting Corporation (CBC)**

Before	The Honourable Mr. Justice E. Johnson
Counsel (Applicants):	Allison Crowe
Counsel (Respondent):	John Solski
Location Heard:	Iqaluit, Nunavut
Date Heard:	May 10, 2013
Matters:	*Criminal Code,* s. 486.4, 486.5(4)(6);

REASONS FOR JUDGMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] The accused is charged with touching three complainants under the age of sixteen for a sexual purpose contrary to section 151 of the *Canadian Criminal Code* (Criminal Code). After the *Information* was sworn on March 27th, 2013, he appeared before Justice of the Peace Alan Weeks at the RCMP detachment in Iqaluit and was released on an undertaking with various conditions including non-communication with the complainants. The charges were adjourned to the Justice of the Peace court on April 12, 2013, without any publication ban.

[2] On April 10, 2013, the applicant Canadian Broadcasting Corporation (CBC) broadcast a story that identified the accused and stated "Court officials have refused to say whether a publication ban is in place on the identity of the accused".

[3] On April 12, the accused appeared before Justice of the Peace Nicole Sikma. She issued a publication ban under Criminal Code section 486.4 (1) banning the publication of the names of the complainants. The applicant Patricia Bell (Bell) requested clarification about whether the publication ban also included the name of the accused. The Crown submitted that it was routine procedure in these types of cases to include a ban on the publication of the name of the accused. Bell put on the record that CBC opposed the inclusion of the name of the accused in the ban. Justice of the Peace Sikma adjourned the matter to this Court.

[4] Later in the day the parties appeared before Justice Mahar to clarify whether the name of the accused was included in the publication ban. The Crown reiterated its position that the ban should include the name of the accused. Since Counsel for the accused did not oppose the Crown position, Justice Mahar broadened the ban to include the name of the accused without giving notice to the applicants that the issue was before this Court.

[5] Upon learning that Justice Mahar had broadened the publication ban to include the name of the accused, the applicants filed a *Notice of Motion* requesting an Order allowing and directing the respondent to make written application for an order banning publication of the accused's name with notice to CBC and its counsel, as set out in section 486.5(4) of the Criminal Code *(Code)*.

[6] The applicants also request further orders directing a hearing into the merits of the respondent's application for a ban on publication pursuant to section 486.5(6) and granting standing to the applicants Patricia Bell, Emily Ridlington, Counsel for CBC and other interested parties as defined in section 486.5(4)(b) to be heard at the section 486.5(6) hearing.

[7] The motion came before me on May 10th for argument. The Crown informed this Court that it was not opposed to this Court granting an order amending the order issued by Justice Mahar by deleting the name of the accused from the publication ban. The Crown submitted that since the name of the accused had already been published it was now redundant to issue a ban. However, the Crown did not accept the draft order submitted by counsel for CBC and requested that recitals 3 and 4 be removed.

[8] Counsel for CBC accepted the practical reason put forward by the Crown for removing the name of the accused from the ban but argued that there were larger issues at stake that were covered in the case law submitted in the *Notice of Motion*. This included the interpretation of sections 486.5 (4) and (6) of the Criminal Code and the failure of the Crown to give notice about the expansion of the ban.

[9] After hearing argument from counsel for both parties judgment was reserved.

II. ISSUE

[10] Does section 486.4 of the Criminal Code authorize a judge or justice to include in a publication ban the name of the complainant and the accused without resorting to section 486.5 to order that a hearing be held where the media can make representations?

[11] What is the interpretation of the NCJ media policy?

A. Section 486.4 authorization

A.1 Crown argument

[12] The Crown argues that section 486.4 of the Criminal Code is broad enough to include the authority to include the name of the accused without notice to the media. Section 486.5(1) states that "Unless an order in made under section 486.4", the prosecutor, a victim or a witness may apply to a judge and the judge may hold a private hearing and make the appropriate order. If section 486.4 includes the authority to include the name of the accused then section 486.5 is not applicable.

A.2 Applicants argument

[13] The applicants rely on the following authorities to argue that section 486.4 of the Criminal Code only authorizes a court to ban the publication of the name of the complainants. Any broadening of the ban requires notice to the media and a hearing under section 486.5:

(a) *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19
(b) *R v Canadian Broadcasting Corporation*, 2010 ONCA 726, 262 CCC (3d) 455
(c) *A G (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175, 65 CCC (2d) 129
(d) *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 94 CCC (3d) 289.
(e) R v Mentuck, [2001] 3 SCR 442, 158 CCC (3d) 449 *[Mentuck]*

(f) *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41. 197 CCC (3d) 1
(g) *R v Dalzell*, (1991) 46 OAC 1, 63 CCC (3d) 134

A.3 Analysis

[14] Section 486.4 states:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151…
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
>
> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
>
> (*b*) on application made by the complainant, the prosecutor or any such witness, make the order.
>
> …
>
> (4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

[15] The Ontario Court of Appeal considered a predecessor to section 486.4 in *Southam Inc v Ontario* (Ont CA) [1989] OJ No 362, 47 CCC (3d) 21 [Southam]. In that case, a former high school teacher was charged with gross indecency and sexual assault. At the commencement of the trial, the Crown orally applied for a publication ban on the names of the complainant, the name of the accused, and the name of the High School. Defence counsel supported the motion and the District Court trial judge granted the motion. The accused entered a guilty plea and was sentenced. Southam Inc. applied to Reid J. of the Superior Court to quash the order prohibiting the publication of the name of the accused, arguing the trial judge had no jurisdiction to make the order. Reid J. upheld the trial judge and ruled he had not exceeded his jurisdiction.

[16] Blair J. noted that the Supreme Court of Canada had restored the constitutionality of section 442(3) in *Canadian Newspapers Company Limited v The Attorney General of Canada*, [1988] 2 SCR 122, 43 CCC (3d) 24 stating:

> While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by s. 442(3) on the media's rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media's rights that the legislative objective is outweighed by the abridgement of freedom of the press.
>
> Respondent further argued that s. 442(3) has a potential chilling effect on the media because in any given case it is difficult to ascertain what evidence could disclose the identity of the complainant. There is thus a risk that the press will choose not to publish any meaningful report on some trials. In my view, it is sufficient to say that media people are certainly competent enough to determine which information is subject to the ban; if not, the judge in his or her order can clarify the matters which cannot be published. [Emphasis added.]

[17] Blair J., in *Southam*, then stated that no evidence is required for an application for an order banning the disclosure of the name of the complainant under the equivalent of the current section 486.4. However, in holding that Reid J. erred about the jurisdiction of the trial judge, Blair J. held that evidence is required to expand the ban beyond the name of the complainant and gave directions for the guidance of the bar in the future.

> If, as in this case, the complainant or the prosecutor wishes to obtain a more specific order prohibiting the naming of the accused or other persons or places on the ground that such information would disclose the identity of the complainant, evidence must be provided to support the application. If not, the judge is without jurisdiction to exercise his discretion to make the order. In my opinion, this is true also of any application which might be made by the media to clarify the matters included in a non-publication order, as suggested by Lamer J. in Canadian Newspapers… because evidence would be required to show that the naming of other persons or places could disclose the identity of the complainant. Without the protection of such a clarifying order, the media must assume the risk of publishing information which might identify a complainant.

[18] He indicated that the evidence could be provided by viva voce evidence, affidavits or the submissions of counsel. The issue that he did not address was how the media or other interested parties would be notified about the Crown's request for an expanded ban so that contrary evidence and argument could be made and considered by the judge. As noted by Iacobucci J. in *Mentuck,* this is an important consideration.

> [38]In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where Charter-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application"…

[19] It appears section 486.5 was enacted to address this problem. It came into force in July 2005, and created the rules that govern any application that goes beyond the basic ban on the publication of the name of the complainant in section 486.4. It states:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> (2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.
>
> (4) An applicant for an order shall
>
> (*a*) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
>
> (*b*) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.
>
> (5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.
>
> (6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.
>
> (7) In determining whether to make an order, the judge or justice shall consider
>
> (*a*) the right to a fair and public hearing;

(*b*) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;

(*c*) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(*d*) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(*e*) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(*f*) the salutary and deleterious effects of the proposed order;

(*g*) the impact of the proposed order on the freedom of expression of those affected by it; and

(*h*) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(*a*) the contents of an application;

(*b*) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(*c*) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

[20] I am satisfied that section 486.4 is applicable where the Crown only wants a publication ban on the name of the complainant. The order would usually be requested at the first appearance in court and there is no requirement to give notice to the media. However, where the Crown seeks to ban publication of the name of the accused or other details contain within the information in the court file or revealed in court, it must abide by the provisions of section 486.5 and give notice to the media as provided in 4 (b) above.

[21] As held in *R v Adams,* [1995] SCJ No 105, 103 CCC (3d) 262, I am satisfied I have jurisdiction to amend the Order issued by Justice Mahar because the name of the complainant is still covered in the Order and there has been a change of circumstances to justify amending the order. Accordingly the draft consent order with all the recitals is granted.

B. Interpretation of the Nunavut Court of Justice media policy.

[22] Section 4.1 of the *Access to Court Records Policy* (the Policy) of this Court states that members of the public have a presumptive right of access to all court records.

> Members of the public have a presumptive right of access to all court records with the exception of protected case file documents and restricted case files. Even where a case file is sealed, members of the public have a right to know that a case file exists.

[23] Section 2.1 of the Policy defines "access" as including the right to view and publish unless otherwise ordered by a judge:

> ' "Access" means the ability to view a court record or exhibit in person and includes a right to copy and publish the record or the information contained in the record or exhibit unless a judge orders otherwise.'

[24] In making a decision, judges are guided by the guidelines in Section 4.2 of the Policy. It states that access to a case file is subject to the following guidelines:

> a) Public access is an important element of judicial accountability and can only be curtailed where there is a need to balance or protect other important values or constitutional rights.
>
> b) The Court must be vigilant to ensure that all witnesses, victims of crime, those accused of a crime but not found guilty, and those vulnerable to court processes, do not have their privacy rights violated or find themselves subjected to harassment due to an inappropriate disclosure of a record.
>
> c) Public access to filed documents must not harm legitimate privacy interests or compromise protections established by law or court order.

d) Where there is any question about whether access to the information requested is permitted under this policy or a statute, the Court Records Officer shall make a preliminary ruling. If the person seeking access is dissatisfied with the position taken by the Court Records Officer, the issue shall be referred to the judiciary for a final determination of the issue.

e) The Court reserves the right to redact any document in a case file, including an exhibit or transcript that contains personal data identifiers, sensitive personal information, or sensitive business information prior to granting access to any member of the public.

[25] Section 4.3 of the Policy states that subject to a non-publication order, members of the public may be provided with the name of the accused after the first court appearance:

Subject to a non-publication order or a court order to the contrary, the following information may be provided to the public, either in person or by telephone, by the Court Records Officer or his/her designate:

a) Adult criminal cases (only after 1st appearance/arraignment):

- Confirmation of the name(s) of the accused;
- Age of the accused in years;
- Date of the alleged offense;
- Charges laid (referring to the section number and general description of the offense);
- Disposition (sentence, adjournment, withdrawn, etc.);
- Plea or election;
- Name of the presiding judge;
- Name of the Crown and defence counsel; and
- Information as to the existence and contents of any non-publication orders.

[26] It appears that an ambiguity in section 4.3 of the Policy led to this case unfolding as it did. The court administration interpreted first appearance as being the first appearance in the courthouse while CBC interpreted first appearance as being the first appearance before Justice of the Peace Weeks at the RCMP detachment. CBC prudently sought clarification from court administration about a publication ban. When it did not receive a conclusive answer CBC published the name of the accused. When the matter came up next in Justice of the Peace court the Crown requested a non-publication order for the name of the accused. Bell on behalf of CBC objected and the matter was adjourned to later in the day before Justice Mahar.

[27] I am satisfied that CBC's interpretation of the current policy was technically correct. A first appearance for a person charged with an offence is when he or she first comes under the jurisdiction and legal control of a justice or judge to answer the charges. A police officer has a number of options after he or she swears an *Information* that charges a person with committing an offence. If the officer arrests the person without a warrant he or she may release the person from custody and issue the person a summons to appear in court on a fixed date or issue an appearance notice requiring the person to appear in court on a fixed date. If the officer seeks additional conditions in the release other than those included by statute he or she must have the person appear before a Justice of the Peace, as occurred in this case. Where this occurs, the Justice of the Peace frequently attends at the police station and adds the additional conditions.

[28] As soon as the Justice of the Peace reads the charges to the accused and issues a process document like an undertaking, the accused comes under the jurisdiction of a court and must attend court as required until the charges have been adjudicated or withdrawn. In this case, that occurred when the accused appeared before Justice of the Peace Weeks on March 27, and that was his first appearance for the purposes of the Policy. On the other hand, if the police released the accused with a summons or appearance notice the accused would not have had a first appearance. That would occur when he appeared in court as required by the summons or appearance notice.

[29] The police or Crown should have requested a non-publication ban at the appearance before Justice of the Peace Weeks or he could have inquired whether one was required given the nature of the charges. He could then have issued the standard ban on the publication of the name of the complainant. However, this would not cover the publication of the name of the accused and the media would be free to publish that information. Technically CBC could have published the name of the complainant but exercised good judgment in not doing so before this issue was clarified. In the future the police, Crown, or Justice of the Peace dealing with an out of court appearance should ensure that the publication ban on the name of the complainant is made at the first appearance.

[30] If the police or the Crown wish to expand the ban to include the accused or other information they must make the application at the first appearance before the Justice of the Peace. He should then refer it to this Court for direction under section 486.5.

[31] Since the media may not know about the first appearance, the police or Crown should serve notice to the media that the publication issue has been referred to this Court. Pending the disposition of the application in this Court, the media should not publish the name of the accused.

Dated at the City of Iqaluit this 15th day of May, 2013

Mr. Justice Earl D. Johnson
Nunavut Court of Justice